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SUPREME COURT U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1904

NO. 49.

JOHN F. HILL,

Plaintiff in Error,

vs.

WARREN E. McCORD,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Petition for Rehearing

W. F. BAILEY,
W. H. STAFFORD,
Counsel for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1904

NO. 303

JOHN F. HILL,

Plaintiff in Error,

vs.

WARREN E. McCORD,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Petition for Rehearing

John F. Hill, plaintiff in error, feeling aggrieved by the decision of this Court, affirming the judgment of the Supreme Court of the State of Wisconsin, and believing from a perusal of the opinion of this Court, delivered herein, that two important questions were overlooked by the Court, most respectfully petitions this Honorable Court for a rehearing upon said questions, and respectfully showeth unto this Court as follows:

The first of these questions is, Whether, at the time of the passage of the Act of June 3, 1896, the matter, to wit: the contest proceedings inaugurated by the plaintiff in

error, was still pending in the Department of the Interior?

It is stated in the opinion of this Court that such matter was pending at the time of the passage of said act.

We respectfully call the attention of the Court, that from the record, page 219, it appears that the final act was the decision of the Secretary of the Interior, made April 28th, 1896, and that no proceedings whatever were taken thereafter until after the passage of the Act of June 3, 1896, when the motion to review the former decision of the Secretary and to confirm the entry of Jacobus under that act were made. That such decision was final and had the effect to restore the land to the public domain seems to be a settled rule of the Interior Department.

Land Decisions, Vol. 6, page 563.
" " " 7, " 163.
" " " 19, " 547.
" " " 20, " 191.
" " " 22, " 77.

Hence it follows, and the decisions above cited so emphatically declare, that the entry, the subject of the final decision of the Secretary of the Interior, becomes and is cancelled, without any further act, entry or record. This being true, the Act of 1896 has no application, as it is expressly declared in and by said act, "That this act shall not apply to commutation and homestead entries in which final certificates have been issued and which have heretofore been cancelled, when the lands made vacant by such cancellation have been re-entered under the homestead act."

That a right of entry acquired is equivalent to an actual

entry seems also to be a rule of the Department, as declared in giving construction to an act using the same term.

4 Land Decisions 463, citing numerous precedents, and also seems to accord with the doctrine of this Court as declared in

Shipley vs. Cowan, 91 U. S. 330.

The second question is: Whether fraud in making a commutation entry precludes an entryman from the beneficial provisions of said Act of June 3, 1896.

That the Secretary expressly found from the evidence, that one of the entries was not in good faith, but was fraudulent, conclusively appears from his decision of the motions to review and confirm, and it is stated in his decision, "The evidence in the case at bar clearly shows that *the entry* was not made in good faith, and the proof submitted by the entryman was fraudulent," etc.

There may be two, and only two, entries under the homestead laws: The first is the original entry for the purpose of acquiring a home. The second is based upon the first, and is called a cash or commutation entry, to be allowed only where certain prescribed conditions actually exist, one of which was continuous residence in good faith, for the sole purpose of making a home for the full period of fourteen months after date of allowance of original entry.

This later entry is one of right, where the prescribed conditions exist. No act is necessary except to verify compliance with such conditions and payment for the land. If the proofs are truthful, and show compliance with the law in this respect, commutation entry follows and becomes

complete as a matter of course. If the proofs are not truthful in this respect, then the commutation entry is fraudulent, and not in good faith. It is immaterial whether the original entry was made in good faith, or otherwise, if the commutation entry was fraudulent. Neither is it a question of what the state court may have found it this respect. The question is, What did the Secretary find and determine? The only possible fraud in making a commutation entry lies in the character of the commutation or final proofs.

This Court in its opinion declares that the entry referred to by the Secretary, was the commutation entry, and the fraud and want of good faith mentioned were in the commutation entry. Quoting from the opinion: "The reference in this (the decision of the Secretary) to the decision of the Commissioner makes it clear that the fraud and the want of good faith mentioned were in the *commutation entry* and the supplemental proofs."

Plaintiff in error strongly insisted that the Secretary found that such commutation entry was fraudulent, and this was one of the principal questions in issue between the parties, the defendant in error insisting and so alleging, that there was no finding of fraud as to such entry.

The evidence was undisputed and conclusive that the commutation proofs were fraudulent. They appear on page 60 *et seq.*, record. Jacobus' affidavit appearing on page 64, in which he states, that himself and wife had resided continuously on the land since first establishing residence thereon; that he was absent at different times two or three weeks at a time, earning money to support his family and improve his place, never absent exceeding three weeks at a

time, and his wife had always lived continuously on the land. The Commissioner found, p. 217 record, that such affidavit was false, in finding that Jacobus only made occasional visits to the land on the Sabbath Day, and that his wife stayed on the land only a part of the time, and we respectfully urge that the Secretary referred to such finding in his decision.

Referring to the provisions of the Act of June 3, 1896, it appears that the very first condition made in the act relates to a fraudulent commutation entry as follows: "That whenever it shall appear to the Commissioner of the General Land Office that an error has heretofore been made by the officers of any local land office in receiving premature commutation proofs under the homestead laws, and, that there was no fraud practiced by the entryman in making such proofs," etc.

We respectfully urge the Secretary could not have had in mind the supplemental proofs, in his statement that the entry was in bad faith, because they were no part of the proceedings relating to the commutation entry, but subsequent.

He must, in the very nature of things, have referred to something that was connected with such entry. The entry to which he referred was some completed act. The commutation entry as stated by this Court. The Secretary declares the entry was in bad faith, and also as a separate and distinct ground, the proofs were also fraudulent. He certainly, as we respectfully urge, could not have referred to the supplemental proofs, in characterizing the entry as being in bad faith, if he did have them in mind in characterizing the proofs as fraudulent. There was, as he de-

clared, bad faith in the entry, independent of the fraud in the proofs, whether original or supplemental.

We therefore respectfully urge, that the Secretary determined there was bad faith in the entry of Jacobus, and this Court has declared that he referred to the commutation entry, and hence such determinations became and are absolute against any right of Jacobus or his grantee to the land, and are conclusive against them under the Act of June 3, 1896.

Most respectfull submitted,

W. F. BAILEY,
W. H. STAFFORD,
Counsel for Plaintiff in Error.

I, W. F. Bailey, counsel for the plaintiff in error, do hereby certify that the foregoing petition is, in my opinion, well founded in law, and that it is not interposed for delay.

W. F. BAILEY.